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No. 1041

In the Supreme Court of the United States

OCTOBER TERM, 1967

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL.,
PETITIONERS

v.

HOWARD W. HARRIMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of California, Southern Division, denying petitioners' motion for a preliminary injunction (Pet. App. 12a–17a)[1] is reported at 248 F. Supp. 44. The District Court's memorandum opinion granting respondents' motion for summary judgment dismissing the action (Pet. App. 18a–19a) is unreported. The opinion of the United

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "R." refers to the relevant volume of the certified transcript of the record in the court of appeals, which petitioners have filed with the Clerk of this Court.

States Court of Appeals for the Ninth Circuit (Pet. App. 1a–11a) is reported at 382 F. 2d 1003.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1967. A timely petition for rehearing was denied on October 25, 1967. The petition for a writ of certiorari was filed on January 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in light of the particular facts here involved, both courts below correctly held that the railroad petitioners were precluded from challenging or enjoining the award of unemployment benefits to their former employees under the Railroad Unemployment Insurance Act.

STATUTE INVOLVED

Sections 4 and 5 of the Railroad Unemployment Insurance Act, 45 U.S.C. 351–404 (1964), as amended (Supp. II, 1965–66), are reprinted in the Appendix to the petition (pp. 20a–29a). Other pertinent provisions of the Act are set out in the Appendix, *infra*, pp. 13–15.

STATEMENT

In August 1963, Congress appointed an arbitration board to resolve the long-standing controversy over the railroads' desire to eliminate the jobs of firemen. Public Law 88–108, 77 Stat. 132. Paragraph C(6) of the arbitration award, which was rendered in November 1963, provided that firemen whose jobs were to be eliminated and who had more than two and less than ten years' seniority (hereinafter "C(6) firemen")

should retain their rights to engine service assignments until they were offered comparable jobs such as engineer, fireman, brakeman or clerk, and that if a C(6) fireman refused the offer of a comparable job he would forfeit his employment and seniority rights subject to his right to obtain a severance allowance (Pet. App. 30a–31a). A large number of C(6) firemen elected to take the severance allowance rather than another type of job. Many of these men were unable to secure other work and subsequently applied for unemployment insurance benefits under the Railroad Unemployment Insurance Act, 45 U.S.C. 351–404 (1964), as amended (Supp. II, 1965–66) (R. II, 91).

Section 4(a–2) of the Act, 45 U.S.C. 354(a–2), provides that a claimant for benefits will not be considered unemployed if the Railroad Retirement Board finds that he "left work voluntarily" without "good cause," and that his benefits will be postponed for a thirty-day period if the Board finds that he "failed, without good cause, to accept suitable work available * * * and offered to him * * *." On June 5, 1964, the Board, acting through its delegate, the Director of Unemployment and Sickness Insurance,[2] determined that C(6) firemen who elected to take severance pay rather than a comparable job were not to be regarded as having left work "voluntarily" or to have "failed, without good cause, to accept suitable work" within the meaning of Section 4(a–2) (Pet. App. 32a–33a). In processing the claims of C(6) firemen the Board has continued to require that all the statutory

[2] The authority for the delegation is found in 45 U.S.C. 355(b) and 362(m) (1964), and 20 C.F.R. 320.5.

eligibility requirements be met before paying benefit claims (R. II, 93).

Petitioners, two of the railroads that are employers within the meaning of the Act, thereafter instituted this action in the United States District Court for the Northern District of California, Southern Division, against the members and officials of the Railroad Retirement Board, seeking (1) an injunction prohibiting the payment of unemployment benefits to any C(6) firemen electing to take severance pay rather than a comparable job and (2) a declaration that the Board misconstrued the Act in ruling that these C(6) firemen were not disqualified from receiving unemployment benefits (R. II, 1–31; R. IV, 170–172). Petitioners also sought a declaration that the Board erred in failing to make specific findings as to the eligibility for benefits of each C(6) fireman.

The district court denied petitioners' motion for a preliminary injunction (Pet. App. 12a–17a), and granted the respondents' motion for summary judgment dismissing the action (Pet. App. 18a–19a). The court of appeals unanimously affirmed both orders (Pet. App. 1a–11a). The court of appeals rejected petitioners' procedural contention, holding that the Board's ruling on the common question of law presented by the claims of the C(6) firemen was necessary to "assure a reasonable degree of uniformity in the application of the Act to benefit claims," that the application of the Board's ruling to individual claims meets any requirement in the Act that findings be made with respect to each claimant, and that the procedure followed by the Board was "in line with

the type of administration authorized by the Act" (Pet. App. 4a–6a).[3] The court of appeals did not find it necessary to pass upon petitioners' contention that the Board misconstrued the Act in ruling that the C(6) firemen were not disqualified, holding that the Act precluded judicial review of this question (Pet. App. 6a–11a).[4]

ARGUMENT

1. The court of appeals was plainly correct in ruling that the Railroad Unemployment Insurance Act, 45 U.S.C. 351–404 (1964), as amended (Supp. II, 1965–66), precludes judicial review of Board determinations granting claims for benefits. Subsections 5(c) and 5(f) of the Act, 45 U.S.C. 355(c) and (f) (Pet. App. 24a–26a, 27a–28a), provide for judicial review of Board determinations in an appropriate court of appeals in three specified cases, not including grants of claims for benefits.[5] Subsection 5(g) of the Act makes clear that judicial review is precluded in all other instances:

> (g) Findings of fact and conclusions of law of the Board in the determination of any claim

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[3] The court found it unnecessary to decide whether 45 U.S.C. 355(b) authorizes but does not require findings each time an applicant applies for benefits (Pet. App. 6a, n. 4).

[4] Although, as noted, the court rejected petitioners' procedural contention, it stated that this issue also was not subject to judicial review (Pet. App. 11a).

[5] Judicial review is authorized: (1) where an employee or his union seeks review of a denial of a claim for benefits; (2) where an employer seeks review of a determination that an individual who has been paid benefits is in fact an employee; and (3) where an employer seeks review of a decision requiring it to make contributions to the insurance fund or denying its claim for refund of such contributions.

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> for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this chapter, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section.[6]

The legislative history of the Act confirms that Congress intended to preclude suit by an employer to enjoin the payment of unemployment benefits to its

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[6] There is no merit in petitioners' contention (Pet. 21–24) that subsection 5(g) precludes judicial review only of those matters to which Subsections 5(c) and 5(f) relate and therefore does not preclude judicial review of Board determinations granting benefit claims. By its terms, subsection 5(g) applies to *all* "[f]indings of fact and conclusions of law of the Board in the determination of any claim for benefits * * *," which would include determinations granting as well as denying claims. Congress obviously intended to preclude judicial review of determinations granting claims since the finality provision in subsection 5(g) applies specifically to the Comptroller General, who would be primarily interested in claims that are granted. Petitioners' grammatical argument was fully answered by the court of appeals' analysis of the statute (Pet. App. 10a–11a). As the court noted, the word "other" in the second clause of subsection 5(g) merely expands the first clause of subsection 5(g) to preclude judicial review of determinations which are covered by subsection 5(c) but which are unrelated to claims for benefits or refunds.

former employees. When the statute was enacted by Congress in 1938, railroad spokesmen complained during the congressional hearings that "there is no appeal provided anywhere in the bill for the railroads which pay the freight."[7] Congress, however, did not change the judicial review provisions of the Act to meet the railroads' objections. Moreover, the congressional hearings in 1945 on a bill which, *inter alia,* provided for judicial review in the courts of appeals rather than, as formerly, in the United States district courts, made clear the understanding of both Congress and the railroads that an employer has no right to judicial review of grants of unemployment benefits to its former employees.[8] Indeed, in thirty years of administration of the Act, there has been only one attempt by an employer, other than the instant case, to contest benefit payments to employees. In that case, *Railway Express Agency* v. *Kennedy,* 189 F. 2d 801, certiorari denied, 342 U.S. 830, the Seventh Circuit also held that the Act precluded maintenance of the action (see Pet. App. 11a, 16a).

2. There is no merit in petitioners' contention that, in precluding the maintenance of this suit, Congress

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[7] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 10127, 75th Cong., 3d Sess., p. 214; Hearings before the Senate Committee on Interstate Commerce on S. 3772, 75th Cong., 3d Sess., p. 125.

[8] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1362, 79th Cong., 1st Sess., p. 1091. Although only "annuities" were mentioned specifically, the discussion concerned judicial review provisions which the amendments were to make common to both the Railroad Retirement and Unemployment Insurance Acts.

violated Article III or the Due Process Clause of the Constitution.[9] The cases cited by petitioners (Pet. 13–19) involved administrative orders which operated directly upon the parties concerned and substantially affected their legal interests.[10] In contrast, petitioners, who were not parties to the Board proceedings, cannot show that the administrative ruling sought to be reviewed here will have any substantial impact on their economic or other legal interests. They have no property interest in nor any control over the Treasury fund (the Railroad Unemployment Insurance Account) which is the source of the unemployment benefits paid out by the Railroad Retirement Board. See 45 U.S.C. 360 (Supp. II, 1965–66). Moreover, petitioners cannot demonstrate that the Board's ruling will have any significant effect on the contributions which they must make to that fund. 45 U.S.C. 358(a) (Supp. II, 1965–66) requires that an employer contribute to the fund a specified percentage of the total compensation which it has paid to its employees during the preceding calendar year; the employer's contribution does not depend upon the amount of unemployment benefits which

[9] Petitioners adverted to constitutional "problems" at pages 55 and 56 of their 66-page opening brief in the court of appeals.

[10] *E.g.*, *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, and *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U.S. 418, involved challenges to confiscatory rate orders; *Estep* v. *United States*, 327 U.S. 114, involved a criminal prosecution for violation of an induction order; *Crowell* v. *Benson*, 285 U.S. 22, involved an employer's individual liability to his employee for benefits under the Longshoremen's and Harbor Workers' Compensation Act.

are paid to its former employees."[11] In view of the insubstantiality of petitioners' interests, and the need for finality and deference to administrative judgment in the specialized field here involved, the instant case plainly falls within the body of decisions in which this Court has sustained congressional preclusion of judicial review. See 4 Davis, *Administrative Law,* Secs. 28.18–28.19 (1958).

3. Petitioners cannot in any event overturn the Board's ruling that the C(6) firemen were not disqualified from receiving unemployment insurance benefits under the Act because they elected, pursuant to the arbitration award, to take severance pay rather than a comparable job. The Board's determination effectuates the clear intent of the arbitration award and of Congress to preserve to the C(6) firemen a free election which will not result in a denial of the benefits

[11] The likelihood that the unemployment benefits at stake here will have an effect on the amount of petitioners' future contributions is remote. Petitioners assert that more than $2.5 million in unemployment benefits have already been paid out (Pet. 7), and that approximately $650,000 in benefits remain unpaid (R. IV, 176). However, since the record shows that the deficit in the Treasury fund is approximately $270 million and the annual excess of fund income over outgo is approximately $17 million, it would be about 35 years before the fund might reach such a level ($300 million) that, under the present statutory formula, the employer's rate could be reduced from the current 4 percent to 3 percent. See 45 U.S.C. 358(a) (Supp. II, 1965–66); R. II, 84–86. This Court has held that a similar "bare possibility of some injury in the future" under a comparable State insurance statute presents no "justiciable question" entitling the employer to judicial review. *Gange Lumber Co.* v. *Rowley*, 326 U.S. 295, 305.

of the Unemployment Insurance Act.[12] Moreover, the Board's exercise of its experienced judgment in the specialized field committed to its administration must be accepted where, as here, it is reasonable.[13]

4. Finally, the court of appeals was plainly correct in holding that the Board's ruling on the common question of law presented by the claims of the C(6) firemen was necessary to "assure a reasonable degree of uniformity in the application of the Act to benefit claims" (Pet. App. 6a), that the application of the Board's ruling to individual claims meets any requirement in 45 U.S.C. 355(b) that findings be made with respect to each claimant, and that the procedure followed by the Board was "in line with the type of administration authorized by the Act" (Pet. App. 4a–6a).[14] The claim filed by the applicant, with its certifications, when accepted and acted upon by the Board, certainly constitutes any "finding" that may be re-

[12] See Hearings, *Railroad Work Rules Dispute*, before the Senate Committee on Commerce on the Administration of Public Law 88–108, 89th Cong., 1st Sess., p. 332 (1965); R. II, 91–92, 135a–135d.

[13] See, *e.g.*, *Boske* v. *Comingore*, 177 U.S. 459; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 153–154; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309; *Udall* v. *Tallman*, 380 U.S. 1, 16. See also *Brotherhood of Railway and Steamship Clerks* v. *Railroad Retirement Board*, 239 F. 2d 37, 44 (C.A.D.C.).

[14] The court of appeals found it unnecessary to decide whether the Act authorizes but does not require findings each time an applicant applies for benefits (Pet. App. 6a, n. 4). See 45 U.S.C. 355(b), which authorizes the Board to establish "such procedures as it may deem necessary or proper for the determination of a right to benefits." See also 45 U.S.C. 362(i), which provides that the Board may accept the claimant's registration as initial proof of unemployment, sufficient to certify payment of benefits.

quired by the statute (see R. II, 87–95; R. IV, 220–226).[15]

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[15] Petitioners' action must fail for several additional reasons not reached by the court of appeals.

First, petitioners lack standing to maintain this action. Since their sole interest is that they must make contributions to the Treasury fund, and the possibility that the amount of these contributions will be affected by the payment of the contested benefits is extremely remote (see note 11, *supra*), the Board's ruling does not affect petitioners' substantial legal interests. The instant situation is thus wholly unlike that in *Stark* v. *Wickard*, 321 U.S. 288, where the Court held that milk producers had standing to challenge the legality of deductions from funds in which they had a personal, legally protected claim.

Second, petitioners' attempt to enjoin the Board from paying unemployment benefits clearly constitutes an unconsented suit against the United States, since the judgment sought would interfere with the statutory program established for the benefit of unemployed railroad workers and thus "interfere with the public administration." *Dugan* v. *Rank*, 372 U.S. 609, 620. Petitioners' contention that the unconsented suit doctrine is inapplicable because the Board acted in excess of its authority (Pet. 12, n. 14) is based upon the false premise, rejected by the court of appeals (Pet. App. 4a–6a), that the Board failed to make findings mandated by the Act (see *supra*, pp. 10–11).

Third, the injunctive relief sought by petitioners would, of course, adversely affect the interests of the C(6) firemen who are neither parties to nor represented in this action. It seems clear that the litigation should not be allowed to proceed without some representation of these individuals. See *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *Metropolis Theatre Co.* v. *Barkhausen*, 170 F. 2d 481, 485 (C.A. 7), certiorari denied, 336 U.S. 945.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Pertinent provisions of the Railroad Unemployment Insurance Act, 45 U.S.C. 351–404 (1964), as amended (Supp. II, 1965–66), which are not reprinted in the Appendix to the petition, provide as follows:

Section 8, 45 U.S.C. 358 (Supp. II, 1965–66):

§ 358. Contributions.

(a) Employers' contributions.

Every employer shall pay a contribution, with respect to having employees in his service, equal to the percentage determined as set forth below of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after June 30, 1939, and before July 1, 1954, and is not in excess of $350 for any calendar month paid by him to any employee for services rendered to him after June 30, 1954, and before June 1, 1959, and is not in excess of $400 for any calendar month paid by him to any employee for services rendered to him after May 31, 1959:

* * * * *

1. With respect to compensation paid prior to January 1, 1948, the rate shall be 3 per centum;

2. With respect to compensation paid after the month in which this chapter was

amended in 1959, the rate shall be as follows:

If the balance to the credit of the railroad unemployment insurance account as of the close of business on September 30 of any year, as determined by the Board, is:	The rate with respect to compensation paid during the next succeeding calendar year shall be:
	Percent
$450,000,000 or more	1½
$400,000,000 or more but less than $450,000,000	2
$350,000,000 or more but less than $400,000,000	2½
$300,000,000 or more but less than $350,000,000	3
Less than $300,000,000	4

* * * * *

Section 10, 45 U.S.C. 360 (Supp. II, 1965–66):

§ 360. Railroad unemployment insurance account.

(a) Funds constituting account; availability for benefits or refunds.

The Secretary of the Treasury shall maintain in the unemployment trust fund established pursuant to section 1104 of Title 42 an account to be known as the railroad unemployment insurance account. This account shall consist of (i) such part of all contributions collected pursuant to section 358 of this title as is in excess of 0.25 per centum of the total compensation on which such contributions are based, together with all interest collected pursuant to section 358(g) of this title; * * *,

(b) Payment of benefits or refunds.

All moneys in the account shall be used solely for the payment of the benefits and refunds provided for by this chapter. * * *

* * * * *

Section 12, 45 U.S.C. 362:

§ 362. Duties and powers of Board.

* * * * *

(i) Free employment offices; registration of unemployed; statements of sickness; reemployment.

* * * * *

The Board shall prescribe a procedure for registration of unemployed employees at employment offices. Such procedure for registration

shall be prescribed with a view to such registration affording substantial evidence of the days of unemployment of the employees who register. The Board may, when such registration is made personally by an employee, accept such registration as initial proof of unemployment sufficient to certify for payment a claim for benefits.

* * * * *

(m) Delegation of powers.

The Board is authorized to delegate to any member, officer, or employee of the Board any of the powers conferred upon the Board by this chapter, excluding only the power to prescribe rules and regulations.

* * * * *

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